United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7368

B

P/S

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 75-7368

JAMES C. JONES, et al.,

Plaintiffs-Appellees,

-against-

THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION, et al.,

Defendants-Appellants

DOROTHY WILLIAMS, et al.,

Plaintiffs-Appellees,

-against-

THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION, et al.,

Defendants-Appellants.

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLEES

JACK GREENBERG
DEBORAH M. GREENBERG
10 Columbus Circle
New York, New York 10019
(212) 586-8397

COVINGTON, HOWARD, HAGOOD & HOLLAND
15 Columbus Circle
Suite 1600
New York, New York 10023
(212) 265-3340

Attorneys for Plaintiffs-Appellees.

I N D E X

I N D E X [cont'd]

TABLE OF AUTHORITIES

Cases Cited

Statutes, Rules and
Regulations Cited

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 75-7368

JAMES C. JONES, et al.,

Plaintiffs-Appellees

-against-

THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION, et al.,

Defendants-Appellants

DOROTHY WILLIAMS, et al.,

Plaintiffs-Appellees

-against-

THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION, et al.,

Defendants-Appellants

APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLEES

PRELIMINARY STATEMENT

This case challenging New York City Civil Service examinations as being racially discriminatory is here on appeal from a Final Order and Judgment of the District Court for the Southern District of New York (Lasker, J.) entered May 23, 1975 (378a)[1/] in accordance with an opinion dated January 10, 1975 (322a), a supplemental opinion dated March 19, 1975 (366a), a further opinion dated April 4, 1975 (371a) and an endorsement dated May 9, 1975 (376a).

1/ This form of citation is to pages of the Appendix, other than the trial transcript. The trial transcript, which is reprinted following page 194a of the Appendix, is cited as (Tr.).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court's findings that each of the five examinations in issue had a discriminatory impact upon blacks and Hispanics must be upheld as not clearly erroneous?

2. Whether the finding below that defendants-appellants (hereafter, "defendants") did not demonstrate the job-relatedness of any of said examinations was not clearly erroneous?

STATEMENT OF THE CASE

This appeal involves two actions which have been consolidated for all purposes. Jones, et al. v. New York City Human Resources Administration, et al. was filed on September 5, 1973. Plaintiffs-appellees (hereafter "plaintiffs") were black provisionally appointed Supervisory Human Resources Specialists ("Sup HRS") who had taken and failed Promotional Examination 1631 and/or Open Competitive Examination 2013, both of which were administered on October [illegible]972 for permanent appointment to the position of Sup HRS.[3] Defendants

---

2/ An Hispanic plaintiff was added by stipulation filed April 30, 1974 (3a).

3/ The promotional examination was open only to permanent Senior Human Resources Specialists (195aa 1). The open competitive examination was open to all persons who met certain education and experience requirements (195ac 1). Persons who passed the promotional exam were to be appointed prior to persons who passed the open competitive exam (195ac 1; Tr. 614).

were the New York City Human Resources Administration, its Administrator, the New York City Department of Personnel, the New York City Civil Service Commission, the Director of the Department and Chairman of the Commission and the two Commissioners. The class action complaint challenged the legality, under 42 U.S.C. §§ 1981 and 1983 and the Fifth and Fourteenth Amendments to the Constitution of the United States, of the Sup HRS examinations on the ground that they had a disproportionately adverse impact upon black and Hispanic candidates and could not be shown to be job-related (13a-28a). By order of September 14, 1973 defendants were temporarily restrained, inter alia, from making any permanent appointments to the position of Sup HRS pending adjudication of the merits (94a-96a). Defendants never answered the complaint.

Williams, et al. v. Human Resources Administration, et al. was filed as a class action January 4, 1974. Plaintiffs in that case were black and Hispanic provisional appointees to the two lower positions in the Human Resources Specialist occupational series, Senior Human Resources Specialists ("Sr HRS") and Human Resources Specialist ("HRS") who on October 14, 1972 had taken and failed Promotional Examination 1626 or Open Competitive Examination 1099 for permanent appointment to the position of Sr HRS or Open Competitive Examination 1097 for HRS. The gravamen of the complaint was essentially the same as in Jones (174a-187a). By order of January 9, 1974 defendants were temporarily enjoined from making any permanent appointments to

the positions of Sr HRS or HRS pending adjudication of the merits (188a-189a). Defendants filed no answer.

After discovery, Jones came on for a four-day trial before the Honorable Morris E. Lasker in January 1974. The facts in Williams were stipulated (190a-194a, 201a-209a). Subsequently, at the request of the trial court, the parties submitted affidavits of experts relating to the disproportionate racial impact of the three open competitive examinations in issue (298a-321a).

In its January 10, 1975 opinion (322a-365a), the District Court found that plaintiffs had established the differential impact of the five challenged examinations (326a-341a), that the examinations were not prepared in a manner consistent with any legally or professionally recognized standards of test validation (341a-358a) and that, regardless of the manner of preparation, defendants had not shown that the examinations were in fact related to the ability to perform the jobs being tested for (358a-363a).

Two subsequent opinions (366a, 371a) and an endorsement (376a) dealt with the class action determination, the details of relief, and counsel fees.

On May 23, 1975 the District Court entered a Final Order and Judgment: (1) consolidating Jones and Williams for all purposes; (2) certifying the action as a class action, the class being defined as those blacks and Hispanics who failed

any one of the five challenged examinations; (3) declaring the five examinations unconstitutional; (4) enjoining defendants from in any way acting upon the results of the five examinations; (5) mandatorily enjoining defendants to develop new selection procedures validated in accordance with the EEOC Guidelines on Employment Selection Procedures, 29 C.F.R. §1607 (1970); (6) discontinuing the preliminary injunction against the administration of examinations for the position of Principal Human Resources Specialist[4]; and (7) denying plaintiffs' request for attorneys' fees (378a-381a).

Defendants appealed from that portion of the judgment which declared the examinations to be invalid (382a, 384a), and plaintiffs appealed the denial of attorneys' fees (386a).

4/ Principal Human Resources Specialist is the highest level in the HRS occupational series. Examinations for this position were enjoined pendente lite on September 14, 1973 to protect plaintiffs' rights to compete for that position (96a).

STATEMENT OF FACTS

A. Background

The Human Resources Specialist series of the New York City Human Resources Administration was established in 1967 (338a). The entry level position is Human Resources Specialist. Promotions are made to successive positions of Senior, Supervisory and Principal Human Resources Specialists (81a). Persons with HRS titles hold a wide spectrum of jobs, in fields ranging from auditing to community development to production of documentary films (Tr. 15, 58, 339, 342; 195ae 1-2). The various titles reflect different salary levels (Tr. 243, 330).

Initially, jobs at the various levels were filled by "provisional" appointees, there being no eligible lists from which to make permanent appointments (81a). In 1969, open competitive examinations were given for all of these titles, since there were no permanent employees who could be promoted. (id.)

The examinations given in 1969 for the levels of HRS and Sr HRS consisted of a written multiple choice test and an oral test. The examinations for the higher level jobs of Sup HRS and Principal HRS were based on "a rated evaluation of training and experience" and "an oral interview for the purpose of final evaluation of training and experience and

determination of the extent to which the candidate's training and experience has fitted him to perform the duties of the position" (119a-120a). Candidates for the position of Sup HRS were placed on one or more of three separate eligible lists, covering the specialities of management, community programs and manpower development and training, according to their qualifications in the various areas (Tr. 213-218). Defendants presented no evidence that Sup HRS's promoted pursuant to the 1969 selection procedure performed their jobs other than in a satisfactory manner.[5/]

No further examinations were given until 1972, and during the interim substantial numbers of provisional appointments were made at all levels in the HRS series (116a). All of the examinations given in 1972 consisted of a written multiple choice test and an oral test and in the case of the promotional exams, seniority was given some weight (120a-116a).[6/] A passing score of 70% was established for all tests (121a) because that is "the normal passing grade for all city examinations" (Tr. 248-249). While the passing grade could have been "scaled", i.e., lowered, it was not because sufficient

---

5/ One of defendants' witnesses, Harold Yourman , had advanced to the position of principal HRS and director of labor relations without ever having taken a written examination (Tr. 331, 364).

6/ The focus in this case is on the written tests. This is appropriate because it was necessary for a candidate to receive a passing score on the written test before he could take the oral. Moreover, virtually no one failed the oral, and its impact at most was to raise or lower the candidate a few places on the eligible list (345a, n.8).

numbers passed the exams to fill the vacancies (Tr. 326-28a).[7/]

While there has been substantial minority representation in the HRS series, that representation would have been considerably diminished if appointments had been made from the eligible lists resulting from the challenged exams. For example, as of November 1973, 92 of the 187 provisional Sup HRS's,[8/] or about 50%, were black or Hispanic (116a). However, of the 161 persons who as of September 1973 had been notified of permanent appointment to the position of Sup HRS (to replace provisionals), only 46, or 28% were black or Hispanic (146a-156a).[9/]

B. The Adverse Impact of the Examinations on Blacks and Hispanics

All of the challenged examinations were administered on October 14, 1972. Defendants were able to produce racial/ethnic identification only for candidates employed by the Human Resources Administration (Appellants' Brief at 7-8).

7/ The pass point takes on particular significance in the case of the promotional exams. Since promotional lists must be exhausted before appointments can be made from open competitive lists, and since in this case the promotional lists would not have been sufficient to fill the positions occupied by provisional appointees, a person receiving a minimum passing score on a promotional exam would have been appointed before a person who scored 100% on an almost identical open competitive exam (Tr. 276, 614).

8/ Of the 194 persons performing as Sup HRS's, only 7 were permanently appointed (116a).

9/ These appointments were stayed by the order of September 14, 1973 (94a-96a).

Complete racial/ethnic pass-fail data is available for the two promotional exams, Nos. 1631 (for Sup HRS) and 1626 (for Sr HRS). For No. 1631, the pass rate for whites was 54%, for blacks, 17%, and for Hispanics, 19% (327a). For No. 1626 the pass rate for whites was 88%, for blacks, 18%, and for Hispanics, 37% (id.).

Since the open competitive examinations were taken by both HRA employees and persons outside the agency, and the defendants had failed to keep racial/ethnic records of the candidates, the pass-fail data is not complete.[10/] For No. 2013

10/Defendants, as local governmental employers, came under the coverage of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq., as of March 24, 1972. P.L. 92-261, 86 Stat.103. Thus the Equal Employment Opportunity Commission's Guidelines on Employment Selection Procedures, 29 C.F.R. §1607, were applicable to defendants at the time these examinations were given. §§ 1607.3 and 1607.4(a) provide:

> Sec. 1607.3 Discrimination Defined.— The use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by Title VII constitutes discrimination unless: (a) the test has been validated and evidences a high degree of utility as hereinafter described, and (b) the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use.
>
> Sec. 1607.4 Evidence of Validity.— (a) Each person using tests to select from among candidates for a position or for membership shall have available for inspection evidence that the tests are being used in a manner which does not violate §1607.3. Such evidence shall be examined for indications of possible discrimination, such as instances of higher rejection rates for minority candidates than nonminority candidates. Furthermore, where technically feasible, a test should be validated for each minority group with which it is used; that is, any differential rejection rates that may exist, based on a test, must be relevant to performance on the jobs in question. (Emphasis added).

Defendants were under a duty to keep records of the race/ethnicity of candidates on civil service examinations.

(for Sup HRS), the race-ethnicity of 51% of the candidates is known. Among the known candidates, the pass rates for the three groups are virtually identical to the rates for No. 1631, the promotional exam: 54% for whites, 16% for blacks and 15% for Hispanics (327a). For No. 1099 (for Sr HRS), 54% of the takers could be identified. The relative pass rates were: whites, 65%; blacks, 26%; and Hispanics, 27% (328a). Finally, for No. 1097 (for HRS), 60% of the candidates were identified. Whites passed at the rate of 51%, blacks at the rate of 31%, and Hispanics at the rate of 19% (328a).

Plaintiffs' expert, Dr. Richard Barrett, stated that the differences in white v. minority pass rates for the known candidates on the open competitive examinations were so great that "those whose race or ethnicity is unknown would have to differ in an unrealistically large degree from those whose identity is known to lead to the conclusion that the tests are free from adverse impact" (302a). He further stated that the tests were made up of items of the type on which blacks and Hispanics generally do more poorly than whites (302a-303a).

C. Preparation and Content of the Examinations

As the first step in the preparation of the Sup HRS examinations,[11/] Leonard Rosenberg, a Senior Personnel Examiner in the Department of Personnel, conducted "field audits". He visited some of the work locations of HRA and interviewed four

---

11/Most of the evidence and testimony in the record relates to examinations 1631 and 2013 for Sup HRS, the exams in issue in Jones. By stipulation, the parties in Williams agreed that the testimony with regard to job-relatedness and preparation of the examinations challenged in that case would be the same (190a-194a, 201a-209a).

of the seven permanent Sup HRS's (Tr. 226; 195ae 1). He did not interview any of the more than 100 provisional Sup HRS's for security reasons (Tr. 227), even though these persons were performing a "multitude of jobs" different from those of the four he interviewed (Tr. 15, 58, 232-36, 342). The audits he prepared were just like thousands he had done in previous years for the Bureau of Classification and Compensation (Tr. 176-78, 230-31).

On the basis of his visits, Rosenberg prepared a two-page Field Audit Report (195ae 1) and a Test Plan indicating the areas to be covered by Exam 1631, the percentage of the questions which should relate to each area, and the total number of questions (195af 1). The tasks Rosenberg observed or learned about through interviews ranged from "negotiation for funds to permit on-the-job development of disadvantaged residents of poverty areas" to "write, direct and produce radio and television shows, to "set up contracts and systems to ensure compliance therewith re printing, cleaning, supplies equipment, reproduction, rentals, etc." (195ae 2). While the test plan arguably covered some of these tasks, the test as it was finally developed did not. (Compare test plan, 195af 1, with examination 1631, 195ab 3-19).

Examination 1631 was constructed by Helene Willingham. She consulted the job analysis and the test plan (Tr. 264), but did not follow them (Tr. 280, 291-92). She used eight

questions on what she characterized as "community relations and organization" prepared by persons she considered to be subject matter experts (Tr. 277-78). She took twenty questions directly from materials used in a HRA training Course (Tr. 279). The purpose of the course was not to prepare HRA employees to be better Sup HRS's, but to help them pass the test (Tr. 292-93).

As finally developed, examination 1631 consisted of 80 questions, not 100 as provided in the test plan. As the following table shows, the areas covered, and their relative emphasis, were very different from those specified in the test plan. (Compare test plan 195af 1, with Willingham's testimony, Tr. 277 and 292, with the exam, 195ab 3-19).

	Areas to be covered	Test Plan	Exam 1631
I	Functions of HRA, etc.	15%	12.5%
II	Current developments, etc.	10%	19%
III	Community relations, etc.	10%	19%
IV	Judgment involving office services, payroll, etc.	20%	none
V	Techniques of staff development supervision, etc.	20%	31% 12/
VI	Machine, equipment and supply purchase, etc.	5%	none
VII	Language usage	10%	12.5%
VIII	Arithmetic computations	10%	6%

The exam was not reviewed by HRA officials to determine whether it was job-related (Tr. 281-82).

12/ While Willingham testified that questions 1-25 related to areas IV, V and VI of the test plan (Tr. 277, 292), they actually relate only to supervision theory (Tr. 301, 605).

D. The Named Plaintiffs

Plaintiff James C. Jones was first employed as an HRS in 1968 (Tr. 22). At the time of trial he had been serving as provisional Sup HRS for almost three years (Tr. 21). From 1971 to 1973 he was Chief of Personnel Processing, Control and Budgeting in the Personnel Division of HRA (Tr. 26-28). In 1973 he became Assistant to the Deputy Director of Labor Relations in the Division of Labor Relations (Tr. 28). Mr. Jones has a B.A. degree in economics from City College of New York, and, shortly after trial, in June 1974, he received his J.D. from St. Johns University (Tr. 24-25). Mr. Jones' supervisor, the Assistant Administrator for Labor Relations, testified that he performed his job with excellence (Tr. 147).

Plaintiff Gloria DeBerry has been a provisional Sup HRS since 1972. She performs the dual positions of supervisor of the HRA Processing Unit and Personnel Manager under the Director of Personnel of HRA. Her performance has always been outstanding (75a, 79a, Tr. 140).

Plaintiff Mary J. Eccles has been a permanent Sr HRS since 1970. From December 1970 to February 1972 she was a provisional Principal HRS serving as Director of Parent Involvement in Project Head Start. At the time of trial she was a provisional Sup HRS, with overall responsibility for parent involvement in more than 500 pre-school programs

funded by the Agency for Child Development, including group day care, family day care and Head Start (43a-44a; Tr. 103). She developed the first Child Development Commission and was liaison from the Commissioner of the Agency for Child Development of HRA to the Mayor's office, the United States Department of Health, Education and Welfare and other agencies (Tr. 104). She received a Masters of Social Work from Columbia University in 1969 (Tr. 102-103). The Deputy Commissioner of the Agency for Child Development testified that Mrs. Eccles is highly competent and that the agency and its clientele would suffer if she were replaced (by a person who passed the exam)(Tr. 135-36).

Charlotte Jefferson was, at the time of trial a provisional Sup HRS serving as Special Assistant to the Commissioner of the Agency for Child Development (47a-50a). Her supervisor rated her competence as "very high" (Tr. 137).

Plaintiff Andrew P. Jackson has been employed by HRA since 1968. In 1971 he was appointed provisional Sup HRS. At the time of trial he was responsible for the overall administration of personnel in the Agency for Child Development. The Deputy Commissioner of the Agency characterized his performance as "formidable" (Tr. 139).

The parties in Williams stipulated that the supervisors of plaintiffs in that case would testify that the plaintiffs had always performed satisfactorily and that if they were to leave their jobs, because of their failure to pass the exams in issue, this would be detrimental to HRA (193a).

ARGUMENT

THE DISTRICT COURT WAS CORRECT IN HOLDING THE FIVE EXAMINATIONS UNCONSTITUTIONAL IN THAT THEY EXCLUDED MINORITIES FROM APPOINTMENT AND WERE NOT SHOWN TO BE RELATED TO JOB PERFORMANCE

A. The Applicable Law

There is a well-defined body of law which clearly articulates the governing standards applicable to the issues presented in this case.

The leading cases in this Circuit are Chance v. Board of Examiners, 458 F.2d 1167 (197), aff'g. 330 F.Supp. 203 (S.D. N.Y. 1971) ("Chance"); Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, 482 F.2d 1333 (1973), aff'g in part and rev'g in part 354 F.Supp. 778 (D. Conn. 1973)("Bridgeport"); Vulcan Society of the New York Fire Department, Inc., v. Civil Service Commission of the City of New York, 490 F.2d 387 (1973) aff'g in part and rev'g in part 360 F.Supp. 1265 (S.D.N.Y. 1973) ("Vulcan"); and Kirkland v. New York State Department of Correctional Services, Nos. 74-2116 and 74-2258 (August 6, 1975), aff'g in part and rev'g in part 374 F.Supp. 1361 ("Kirkland"). The rule established by these authorities is that in a case such as the instant one, if plaintiffs show that an examination has had a disproportionately adverse impact upon a racial or ethnic group, defendants must meet a heavy burden of justifying the use of the test by establishing that performance on

the test bears a demonstrable relationship to the ability to perform the job for which it is used. The District Court, in holding the five examinations unlawful, expressly followed these decisions (324a-326a) and correctly applied the standards laid down therein.

B. The District Court's Ruling That The Examination Had A Disproportionately Adverse Impact Upon Minorities Is Not Clearly Erroneous

1. The Promotional Examinations, Nos. 1631 and 1626

As to the two promotional examinations, Nos. 1631 and 1626, for which complete pass-fail data is available, it is clear that plaintiffs have established their prima facie case on the basis of this data alone. The disparity between the pass rates of whites and minorities was substantial and statistically significant (p. 9, supra; 301-302a, 327a-329a, 333a). Defendants take the position that plaintiffs, in order to prove their prima facie case with regard to these exams, must provide complete statistics with respect to all exams given for positions in the HRS occupational series, that plaintiffs cannot make a "selective challenge" to only some of the exams (Appellants' Brief at 29). As the trial court noted (341a), a similar contention was rejected by Judge Weinfeld in Vulcan:

> The consequence of relying upon one examination is only that any finding of discrimination and the relief to be granted will necessarily be restricted to the scope of the proof. The evidence presented was more than adequate to support a finding of discriminatory impact.

360 F.Supp. at 1271.

2. The Open Competitive Examinations, Nos. 2013, 1099 and 1097.

Among the takers of the open competitive examinations whose identity is known (51% to 60% of the total candidates) the disparity in the pass rates of whites and minorities is likewise substantial and statistically significant (pp. 9-10, supra; 301a-302a, 327a-329a, 333a-334a).

Defendants contend that plaintiffs can make out a prima facie case by nothing less than complete pass-fail statistics, and that Judge Lasker's finding that the open competitive examinations had a disparate adverse impact upon minorities is clearly erroneous. This argument has been rejected, expressly or by implication, by the Supreme Court, this Court and other Courts of Appeals.

In Griggs v. Duke Power Company, 401 U.S. 424 (1971), there was no direct statistical evidence of the disparate impact of the tests that were in issue. In finding discriminatory effect, the Supreme Court relied upon a footnote in Judge Sobeloff's partial dissent in the Court of Appeals, 420 F.2d 1225, 1229 n.6, (4th Cir. 1970) which stated that "no one seriously questions the fact that, in general, whites register far better on the Company's alternative requirements [high school education or test performance] than blacks." 401 U.S. at 430.

In Chance, the District Court found that all fifty of the challenged tests were unconstitutional despite the fact that as to 41 of the exams the number of takers was too small to lead to any meaningful conclusions as to white-minority differences, 330 F.Supp at 212, and on seven of these minorities actually fared better than whites, 330 F.Supp. at 211. In affirming, this Court observed:

> [W]hile not all of us might have made the same factual inferences of racially discriminatory effect from the statistical evidence, . . . none of us can say with the firm conviction required that those factual findings were mistaken.

458 F.2d at 1173.

In Boston Chapter, NAACP v. Beecher, 371 F.Supp. 507 (D. Mass. 1974), an action challenging selection procedures for the position of firefighter in several Massachusetts cities, the District Court, finding the available pass-fail statistics inadequate to establish a prima facie case, relied upon a comparison between population figures and employee figures. The Court of Appeals affirmed, stating:

> Disproportionate impact or prima facie discrimination are simply labels that aid in singling out qualifications which it is reasonable to ask an employer to justify; "complete mathematical certainty" is not required . . .
>
> . . . What in our view conclusively tips the scale in plaintiffs' favor is the uncontroverted testimony, from experts called by both sides, that black and Spanish surnamed candidates typically perform more poorly on paper-and-pencil tests of this type.

504 F.2d 1017, 1020-21 (1st Cir. 1974).

Rogers v. International Paper Co., 510 F.2d 1340 (8th Cir. 1975) involved a challenge to a battery of tests given for transfer into maintenance craft jobs. There was no direct statistical evidence of comparative pass-fail rates. The Court, in reversing the trial court's finding of no discrimination, relied upon evidence relating to performance on the same tests by applicants for production jobs. 510 F.2d at 1349.

In Douglas v. Hampton, 512 F.2d 976 (D.C. Cir. 1975) plaintiffs challenged the Federal Service Entrance Examination, a test given for entry into managerial and professional positions in the federal civil service. The Civil Service Commission did not maintain pass-fail data by race. In finding racially disproportionate impact, the Court relied in part upon studies which compared performance on the FSEE at 50 predominantly black colleges and at 50 predominantly white colleges. The Court rejected defendants' criticisms that there were differences between the samples studied and the actual group of applicants. The Court held that plaintiffs' factual demonstration was corroborated by the "substantial body of evidence that black persons and other disadvantaged groups perform on the average far below the norm for whites on generalized intelligence or aptitude tests." 512 F.2d at 982-83.

In the record before this Court there is substantial evidence other than the incomplete pass-fail data to support the trial court's finding that the open competitive exams had a disparate impact on minorities. Open competitive examination 2013 for Sup HRS differed only by ten questions from promotional exam 1631, as to which the complete statistical data clearly showed disproportionate impact; open competitive exam 1099 for Sr HRS differed in the same degree from promotional exam 1626, as to which the complete data also showed disproportionate impact (Tr. 276-77; 253a, 273a). This evidence of disproportionate impact on examinations that were 87.5% identical, coupled with the disparity among the known takers of the open competitive exams, would be sufficient to shift to defendants the burden of justifying the use of exams. See Rogers v. International Paper Co., supra; Douglas v. Hampton, supra.

Further evidence of the disparate impact of the open competitive as well as the promotional exams is the fact that the replacement of provisionals with persons who passed the tests would have resulted in a substantial decrease in minority representation in the agency (p. 8, supra). Walston v. Nansemond County School Board, 492 F.2d 919, 922 (4th Cir. 1974); Armstead v. Starkville Municipal Separate School District, 461 F.2d 276, 278, 279 (5th Cir. 1972).

Given the available statistical evidence, the trial court found it "distinctly improbable that minority group members in the non-HRA (unknown) group would outperform non-HRA whites on the same examination to the extraordinary degree necessary to

bring the overall passing rates for minorities and whites into rough parity (334a). This conclusion was buttressed by the observation of plaintiffs' expert that the open competitive examinations are "made up of items of the type on which blacks and Hispanics generally do more poorly than whites (302a-303a, 334a). Griggs v. Duke Power Co., supra; Boston Chapter, NAACP v. Beecher, supra; Douglas v. Hampton, supra; Davis v. Washington, 512 F.2d 956, 961 (D.C. Cir. 1975).

On this record, the trial court's finding that the open competitive exams had a racially disproportionate impact is is not clearly erroneous.

Defendants maintain that the lower court's ruling has "ominous implications" and "disastrous consequences" for New York City. (Appellants' Brief at 23, 28). The only consequence, of course, is that defendants will have to give examinations that select people on the basis of their ability to perform the job, a consequence that should benefit not only minorities, but New York City as well. The best answer to defendants' argument may be found in the words of this Court in Vulcan, supra, in holding that Judge Weinfeld's finding of racially disproportionate impact of the firefighter's exam was not clearly erroneous:

> It may well be that the cited figures and other more peripheral data relied on by the district judge did not prove a racially disproportionate impact with complete mathematical certainty. But there is no requirement that they should . . . We must not forget the limited office of the finding that Black and Hispanic candidates did significantly worse in the examination

> than others. That does not at all decide the case; it simply places on the defendants a burden of justification which they should not be unwilling to assume.

490 F.2d at 393 (Opinion by Friendly, J.).

In any event, if this Court affirms the lower court's finding that the promotional examinations were not shown to be job-related, appointments from the lists based on the open competitive examinations for Sup HRS and Sr HRS must be enjoined until valid promotional examinations are given. Otherwise, the vacancies will be filled, and members of plaintiffs' class who, had they passed the promotional exams, would have been entitled to appointment ahead of persons on the open competitive lists, will have no effective remedy.

C. The District Court's Finding That Defendants Did Not Meet Their Burden of Demonstrating the Job-Relatedness of the Examinations Must Be Upheld As Not Clearly Erroneous

The opinion of the court below contains a detailed, carefully documented discussion of the job-relatedness of the examinations (341a-363a). Its findings of basic fact are amply supported by the record, and its finding of ultimate fact, to wit, that the examinations were not job-related, was arrived at by the application of legal standards approved by this Court in Chance, Vulcan, Bridgeport and Kirkland.

Defendants contend that the examinations meet established standards for content validity (125a). The EEOC Guidelines on Employment Selection Procedures, 29 C.F.R. §1607 [13] express a

---

13/ To the extent that the Guidelines embody and articulate generally accepted standards of professional testing (see Albemarle Paper Co. v. Moody, 45 L.Ed. 2d 280,304, (1975) they are clearly useful guides to a judicial assessment of the existence of test validity. Bridgeport, 482 F.2d at 1337 n.6; Vulcan, 490 F.2d at 394 n.8; Kirkland, slip op. at 5407.

preference for criterion-related validity, that is, empirical evidence of a correlation between test performance and job performance. 29 C.F.R. §1607.5.[14/] They state, however, that

> Evidence of content validity alone may be acceptable for well-developed tests that consist of suitable samples of the essential knowledge, skills or behavior composing the job in question.

Id. Similarly, this Court in Bridgeport defined content validity as follows:

> Content validity would be established if the content of the test closely duplicates the actual duties to be performed by the applicant.

482 F.2d at 1338. In Vulcan, this Court cited as "a simple example of an examination having content validity, . . . a typing test for applicants for a job as a typist." 490 F.2d at 395.

Following the approach taken by Judge Weinfeld in Vulcan, which approach was described with approval by Judge Friendly, 490 F.2d at 395, the trial judge, rather than "burying himself in a question-by-question analysis" of the examinations to determine if they were content valid, placed primary emphasis on the process by which they were created. Concluding that the "job analysis and test plan prepared by the city fell short of professional standards as delineated by the testimony and applicable case law" (347a-348a), he proceeded to inquire whether, despite the inadequacy of the procedures by which the examinations were constructed, their content did in fact match

---

14/ This Court has agreed that criterion-related validation is the best method of assuring job-relatedness of a selection procedure. Bridgeport, 482 F.2d at 1337; Vulcan, 490 F.2d at 394-95; Kirkland, slip op. at 5407.

the content of the jobs for which they were used. He found no evidence that the exams were job-related (358a).

1. The Examinations Were Not Prepared in a Manner Consistent With Content Validity.

Fundamental to the construction of any examination purporting to have content validity is a job analysis of the position's duties which will enable examiners to formulate questions capable of measuring the characteristics necessary for job performance. Chance, 458 F.2d at 1174; Vulcan, 360 F.Supp. at 1274.

> Without such an analysis to single out the critical knowledge, skills and abilities required by the job, their importance relative to each other, and the level of proficiency demanded as to each attribute, a test constructor is aiming in the dark and can only hope to achieve job relatedness by blind luck.

Kirkland, 374 F.Supp. at 1373.

Defendants maintain that the field audits performed by Harold Rosenberg constitute the job analyses from which the examinations were prepared (105a-106a [Interrogatories Nos. 18-22], 124a-125a [Paragraphs 14-17]). Plaintiffs' expert testified that the so-called job analyses "do not even remotely meet professional standards" (Tr. 569), and the District Court agreed (347a-348a). The opinion below contains an exhaustive discussion of the inadequacies of the job analyses and of the test construction process generally (347a-358a) and plaintiffs see no useful purpose to be served by a paraphrase of the trial court's findings, all of which are clearly substantiated by record citations.

2. Defendants Have Not Shown the Examinations to Be Job-Related

Having found that the preparation of the examinations did not conform to professionally acceptable or legally required standards, the court below proceeded to consider whether the examinations were nevertheless in fact related to the jobs performed by persons holding titles in the HRS series. Far from finding convincing evidence of job-relatedness, as required by the sliding scale approach of Vulcan, 490 F.2d at 396,[15/] Judge Lasker found that testimony as to the exams themselves only confirmed his conclusion that defendants had not shown them to be job-related (358a).

Leonard Rosenberg, who at time of trial was Assistant Chief, Office of General Examining of the Bureau of Examinations of the Department of Personnel, testified:

> [W]e are not giving an examination for each and every position that holds the title of Supervising Human Resources Specialist. We are giving an examination for the title which encompasses a variety of people in various types of activities, with different types of responsibilities, though essentially all being considered similarly alike to warrant the same title and the same pay. Tr. 242-43.

Twenty-five of the eighty questions on the Sup HRS exams related to principles of supervision even though only 60-65% of Sup HRS's perform supervisory functions (Tr. 391).

15/ See also Kirkland:

> [S]ince insufficient spadework usually results in a poor garden, evidence of unsatisfactory preparation imposed upon the defendants a heavier burden of demonstrating that they had created a satisfactory job-related examination. (Slip op. at 5405)

Even as to those persons, one of defendants' experts testified that knowledge of supervisory principles is not a test of ability to supervise (Tr. 438). This is consistent with the statement of defendants' second expert that the purpose of the tests was not to predict as well as one can the performance of people as Sup HRS's, but simply to establish a ranked list of people who have "a minimum set of knowledge and skills" (Tr. 545-46). He went on to state:

> All it is saying is that one can certify that this bit of knowledge exists. This is the same way as saying that you could certify that a person knows how to add and subtract, but that does not say he will be a good accountant or anything else (Tr. 546).

Since defendants provided no detailed description of the duties of persons in the HRS series, as, of course, they could not do in the absence of an adequate job analysis, there was no way the trial judge could have "evaluate[d] the examinations themselves" to determine their job-relatedness. (See Appellants' Brief at 33).

Finally, defendants argue that the examinations pass constitutional muster since they meet the purposes for which defendant gave them, namely, to provide a pool of people with the basic knowledge necessary to perform a wide variety of jobs. This argument must fail on three grounds:

1) the only constitutionally permissible purpose for which these examinations, which created a racial classification, could be given, was to measure the candidate's relative abilities to perform the jobs for which they were used, Bridgeport, 482 F.2d at 1337;[16] 2)as the trial court found, defendants have not established that there is in fact such a core of skills common to all jobs within the extraordinarily diffuse titles in issue (361a-362a); and 3) defendants presented no evidence of the frequency with which persons with a given title move from one type of job to another. Assuming the desirability from an administrative viewpoint of establishing such a pool of managerial personnel, the selection procedure for such a pool cannot be content validated.[17] To accomplish their purpose, defendants should have developed a criterion-validated procedure, that is, a procedure for which there is empirical evidence of a correlation between test performance and job performance.

16/ Cf. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 45 L.Ed. 2d 280 (1975).

17/ A test is content valid "if the content of the test closely duplicates the actual duties to be performed by the applicant" Bridgeport, 482 F.2d at 1338.

CONCLUSION

For the reasons stated above, the judgment of the court below should be affirmed.

Respectfully submitted,

JACK GREENBERG
DEBORAH M. GREENBERG
10 Columbus Circle
New York, New York 10019

COVINGTON, HOWARD, HAGOOD
& HOLLAND
15 Columbus Circle
Suite 1600
New York, New York 10023

Attorneys for Plaintiffs-
Appellees

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September, 1975, I served two copies of the foregoing Brief for Plaintiffs-Appellees upon the following counsel of record by depositing same in the United States mail, postage prepaid:

W. Bernard Richland, Esq.
Corporation Counsel of the
City of New York
Municipal Building
New York, New York 10007

Attorney for Plaintiffs-Appellees